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WILLIAM R. GUSTAVSON SUITE 1185 9330 LBJ FRWY. DALLAS, TX 75243			FLANIGAN, ALLEN J	
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Please find below and/or attached an Office communication concerning this application or proceeding.

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Application Number: 09/350335

Filing Date: 8/28/2000

Appellant(s): Jeffrey A. Giacomel

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Group 3700

William R. Gustavson

For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 2/17/2005 appealing from the Office action mailed 9/17/2004.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is incorrect. Claims 30 and 34, objected to as dependent claims containing allowable subject matter, are incorrectly listed as having been finally rejected.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

The following is a listing of the evidence (e.g., patents, publications, Official Notice, and admitted prior art) relied upon in the rejection of claims under appeal.

US Patent #5,488,897 to Snyder February 6, 1996.

US Patent # 3,996,847 to Reed December 14, 1976.

US Patent # 3,632,982 to Linger January 4, 1972.

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim 9 is rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the enablement requirement. The claim(s) contains subject matter

that was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention.

The recitation in claim 9 (“a temperature monitor for monitoring a temperature of one of said heat transfer elements, the temperature [of said heat transfer element] being an accurate measure of the temperature of the mass of product”) is confusingly worded (should probably read “the *monitored* temperature”) and is not supported by the disclosure. Given a mass of product into which the device may be inserted, the temperature of different regions within the mass will most definitely vary. Near the inserted cooling or heating members, or near the surface, or near the thermally conductive container holding the mass, the temperature will differ from the temperature of other regions. Even the temperature within the disclosed heat transfer elements made of aluminum, for example, will exhibit a small but distinct thermal gradient (variation in temperature). Thus it is incorrect to imply that the monitored temperature of any of the heat transfer elements (either input 22 or output 20) will *accurately*, i.e. in an error free way, represent the actual temperature of “the mass of product”. The mass of product will typically have a mean temperature, a bulk property that will vary constantly, and would be difficult to accurately measure except under controlled circumstances with sophisticated equipment. No disclosure is provided of the means necessary (an insulated compartment to isolate the apparatus, the pan, and the mass of

product from the environment in order to permit it to reach a steady state, uniform temperature), or of the technique required to create such a thermodynamic “steady state” in which the monitored temperature can be said to “accurately” reflect the temperature of the product.

Claims 1, 4, 6, 7, 24, 31, 33, and 35 are rejected under 35 U.S.C. 102(b) as being anticipated by Snyder.

Snyder shows an aluminum cooking apparatus with parallel ridges 310 that are readable on the claimed input heat transfer elements in parallel spaced planes; the solid base from which these ridges extend (see Fig. 8) is readable on the “at least one output heat transfer element”. It is well known in the art to provide non-stick, easily cleaned coatings on cooking utensils such as pans to facilitate cleaning, as Snyder specifically teaches (lines 18-20 and 45 of column 2). Thus, all of the elements of claim 1 are taught within Snyder. Regarding claims 4 and 24, the recitations of this claim add nothing to the claimed structure, since they concern the intended use of the device. Regarding claims 31 and 35, the claimed “length” is readable on the long dimension of ribs 10R shown, for example, in Figs. 3 and 5 of Snyder et al. Regarding claim 33, note chamber 22 of Snyder et al., which reads on the claimed “pan”.

Claim 9 is rejected under 35 U.S.C. 103(a) as being unpatentable over Snyder et al. in view of Linger.

Linger shows that it is known in the art to provide a temperature sensor in an electric griddle apparatus to provide control of the cooking temperature (note sensor 46 shown in Fig. 3). In view of this, it would have been obvious to one of ordinary skill in the art at the time the instant invention was made to add such a sensor to the electrically heated griddle of Snyder for better control of cooking temperature.

Claim 11 is rejected under 35 U.S.C. 102(b) as being anticipated by Reed.

Reed shows parallel elements readable on the recited “input” and “output” heat transfer elements. Note parallel plates 21 with fingers 22 and handle 43 shown in Figs. 4-7. Either the upper portions 21 or the ring 28 are readable on the claimed “at least one output heat transfer element in thermal contact with the input heat transfer elements. Reed also shows (Fig. 4) a removable handle.

Claims 25-27 are rejected under 35 U.S.C. 103(a) as being unpatentable over Snyder.

The disclosure of Snyder (Figs. 3 and 5, for example) makes clear that the “length” of the ribs 10R of the grid (the long direction as seen in the above figures) is within the claimed range. The examiner reads “length”¹ as the longest dimension, not as the protrusion from the base of the grid, since the

¹ “Length” is defined in *The American Heritage® Dictionary of the English Language, Third Edition* copyright © 1992 by Houghton Mifflin Company, as “the measurement of the extent of something along its greatest dimension: the length of the boat.”

claims do not specify which dimension the “length” is. The Examiner took notice of the longest dimension of such griddles being conventionally within the claimed range, and Appellant has not contested this finding.²

Claims 28 and 29 are rejected under 35 U.S.C. 103(a) as being unpatentable over Reed.

As with the rejection of claims 25-27, the Examiner took notice of the fact that “it is well known that standard foodservice burgers would have a diameter of at least four inches.” Appellant has not contested this finding.

Claims 2, 20, and 32 are rejected under 35 U.S.C. 103(a) as being unpatentable over Reed in view of Snyder et al.

As noted above, Snyder shows that it is known to provide an easy-to-clean, nonstick coating on cooking implements such as griddles used for cooking food; the advantages of such a coating are self evident, and it would have been obvious to one of ordinary skill in the art at the time the instant invention was made to add such a coating to the food-contacting appliance of Reed to make it easier to clean.

(10) Response to Argument

The bulk of Appellant’s arguments regarding the above rejections are similar in thrust to those presented in the previous appeal, in that they speak to differences in the intended use of the disclosed and claimed invention versus

² Appellant does contest the Examiner’s broad reading of the term “length” as employed in

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the intended use of the prior art structures. Other arguments presented either are not commensurate in scope with the claims, or ignore features clearly shown in the prior art. Arguments are presented on pps. 4-8 listing individual claims, but many of these are cursory, at best presenting a restatement of the claim language (see e.g. the argument regarding claims 29 and 20 on page 8 of the Brief), and a blanket assertion that the prior art “clearly does not disclose such structure”, or that the claim is patentable “for the same reason set forth above”. Although such arguments may not be in compliance with 37 C.F.R. 41.37(c)(1)(vii), they will be treated as being separately argued herein.

In arguing the rejection of claim 9 for lack of enablement, the Appellant asserts that “the temperature of the apparatus is very close to the temperature of the mass of product, within 1 degree F. *after acquisition of steady state heat transfer*”(emphasis added). The Examiner relies on this as an admission that the basis of the rejection is well founded. The claims contain no limitation or qualification that the monitor accurately indicates the temperature of the mass of product “after the acquisition of steady state heat transfer”. The presence of such a limitation would likely have obviated this ground of rejection, but it is not present in the claim under appeal. Moreover, to the extent that the claimed device can be said to *approximate* (“within 1 degree F.”) the temperature of the mass of product after acquisition of steady state heat

these claims.

transfer, the same can obviously be said of the temperature sensor of Linger as adapted to the griddle plate of Snyder.

Claim 1 is argued to be patentable over Snyder based on distinctions of intended use. As the Board pointed out in the previous decision on appeal (9/29/2003), "An anticipation under 35 U.S.C. 102(b) is established when a single prior art reference discloses, either expressly or under principles inherency, each and every element or limitation of a claimed invention. See *In re Schreiber*, 128 F.3d 1473, 1477, 44 USPQ2d 1429, 1431 (Fed Cir 1997) and *RCA Corp. v. Applied Digital Data Systems, Inc.* 730 F.2d 1449, 1444, 221 USPQ 385, 388 (Fed. 1984) However, we observe that the law of anticipation does not require that the reference teach what the appellant has disclosed but only that the claims on appeal "read on" something disclosed in the reference, i.e., all limitations of the claim are found in the reference. See *Kalman v. Kimberly Clark Corp*, F.2d 772, 218 USPQ 781, 789 (Fed. Cir. 1983)." The Board also placed Appellant on notice that "by choosing to define an element functionally as in appellant's claims on appeal, appellant assumes risk, that risk being that where the U.S. Patent and Trademark Office has reason to believe that a functional limitation asserted to be critical for establishing novelty in the claimed subject matter may, in fact, be an inherent characteristic the prior art, it possesses the authority to require applicant to prove that the subject matter shown be in the prior art does not possess the characteristic relied upon." In this case, the structure shown in Snyder is fully

responsive to the subject matter of claim 1 (and the other rejected claims) and is inherently capable of being used in the recited manner. Appellants offer no proof that the griddle apparatus of Snyder lacks any of the claimed structural elements, or does not inherently possess the characteristic relied upon (being capable of being placed in a mass of product).

Regarding claim 4, appellant asserts that Snyder “does not disclose” pan contacting surfaces adapted for contacting the bottom of a pan. Clearly, the flat upper end surfaces of Snyder’s ridges are capable of contacting a pan bottom.

Regarding claims 6 and 7, these claims fail to distinguish because

- a. the claims are not limited to an apparatus formed exclusively from aluminum, and thus do not define over the Fig. 4 embodiment of Snyder, for example (which shows heating elements 116 embedded in the apparatus), and
- b. the appellant’s arguments ignore the Fig. 8 embodiment, which does not have embedded heat elements and is formed as a unitary body.

Regarding claim 24, as noted in the general comments regarding appellant’s arguments above, this claim is argued solely based on alleged distinctions of intended use.

Regarding claims 25 and 31, as noted in the rejections above, the term “length” is read in its conventional definition as the greatest dimension of the claimed elements. Appellant points to the specification (page 12, lines 25-28)

in an attempt to limit the claim scope in a manner which distinguishes over what Snyder shows. However, during prosecution, as the Board is aware, limitations from the specification are not to be read into the claims. *E-Pass Techs., Inc. v. 3Com Corp.*, 343 F.3d 1364,1369, 67 USPQ2d 1947, 1950 (Fed. Cir. 2003). Moreover, if the appellant intends to define a term in the claims in a manner contrary to the accepted definition of the term, he is obligated to provide an explicit definition to such effect³. This the appellant has not done. Thus, it would be improper to construe the term “length” in the manner suggested by appellant.

Regarding claim 33, appellant points out that chamber 322 “is not holding a mass of product”. Again, this argument is not commensurate in scope with the claim. Claim 33 recites that the pan is “for holding a mass of product”, not that the pan “is holding a mass of product”.

Claim 35 is argued on the same basis as claims 25 and 31. Please see the comments made above regarding the claimed “length” of the input heat transfer elements.

³ Claim terms are presumed to have the ordinary and customary meanings attributed to them by those of ordinary skill in the art. *Sunrace Roots Enter. Co. v. SRAM Corp.*, 336 F.3d 1298, 1302, 67 USPQ2d 1438, 1441 (Fed. Cir. 2003); *Brookhill-Wilk 1, LLC v. Intuitive Surgical, Inc.*, 334 F.3d 1294, 1298, 67 USPQ2d 1132, 1136 (Fed. Cir. 2003)(“In the absence of an express intent to impart a novel meaning to the claim terms, the words are presumed to take on the ordinary and customary meanings attributed to them by those of ordinary skill in the art.”) However, an applicant is entitled to be his or her own lexicographer and may rebut the presumption that claim terms are to be given their ordinary and customary meaning by clearly setting forth a definition of the term that is different from its ordinary and customary meaning. See *In re Paulsen*, 30 F.3d 1475, 1480, 31 USPQ2d 1671, 1674 (Fed. Cir. 1994).

Claim 11 is another claim that is argued on the basis of intended use. Please see the comments made in regard to the rejection of claim 1 above.

Regarding claim 9, as noted above in comments made in the rejection based on 35 U.S.C. 112, first paragraph, to the extent that the claimed device can be said to *approximate* ("within 1 degree F.") the temperature of the mass of product after acquisition of steady state heat transfer, the same can obviously be said of the temperature sensor of Linger as adapted to the griddle plate of Snyder. For example, the specification describes a possible use of the device for heating (page 9). The placement of a radiant heat source close to applicant's "output" element or elements to perform such heating would correspond closely to the Fig. 8 embodiment of Snyder. Whatever arguments the appellant makes regarding the temperature measured in Snyder being "that of the heating element itself" are similarly applicable to this use of appellant's claimed device as well. Once the griddle of Snyder reaches a "steady state" of heat transfer, meaning whatever food it is placed in contact with has ceased to change temperature, this temperature will presumably be the same temperature as the griddle (otherwise it would not be considered to have reached "steady state"). In this situation, the sensor taught in Linger will be as accurate an indicator of the food temperature as the claimed sensor.

Claim 25 has been discussed above. Appellant asserts that claim 26 is patentable "for the same reasons as set forth above with respect to claim 25", so no further comment appears necessary.

Regarding claim 27, the upper edge of Snyder's ridges is clearly linear. Appellant asserts that such structure "could not be considered a leading edge" but offers nothing beyond this conclusory statement to point to any real distinction between the claimed structure and the prior art. Appellant's remaining arguments concerning this claim again concern distinctions based on intended use.

Regarding claim 28, Appellant again asserts that the Examiner is incorrect in interpreting "length" in claim 28 as the greatest dimension of elements 21 of Reed. The comments made above in the rejection of claims 25-27 as anticipated by Snyder, and in response to arguments regarding the rejection of claim 25, are equally applicable herein.

Claim 29 is argued on the same basis as claim 28, and thus no further comment appears necessary.

Regarding claim 2, appellant argues that there is "no incentive to combine the teachings of these references". Snyder clearly provides such incentive in noting that "ease of cleaning" is provided by a nonstick coating applied to the cooking grid; see lines 18-20 of column 2, lines 61-62 of column 5, lines 5-10 of column 8, and finally the bridging paragraph of columns 9-10:

The metallic portion 476 [of spatula 470] will preferably have a non-stick coating of PTFE. (Such non-stick coatings are sold under various trademarks including TEFLON and SILVERSTONE, among others.) It should be appreciated that the various embodiments of the grids as discussed above would likewise have such a coating.

Even absent a recognition of the advantages of such coatings in Snyder, these advantages would be self-evident to one of ordinary skill in the art. It hardly

requires enunciation that those connected with the foodservice industry well know the substantial amount of time dedicated to cleaning cooking apparatus, hence the wide acceptance of coated cookware. Since Snyder and Reed are drawn from the same art and are drawn to the same type of device (cooking/food heating apparatus), these teachings are properly combinable. Indeed, the “strongest rationale for combining references is a recognition, expressly or impliedly in the prior art or drawn from a convincing line of reasoning . . . that some advantage or expected beneficial result would have been produced by their combination. In re Sernaker, 702 F.2d 989, 994-95, 217 USPQ 1, 5-6 (Fed. Cir. 1983).”⁴

Regarding claim 32, Reed even refers to his elements 21 as “heat conducting fins”. The projecting grills 22 each have generally parallel, flat surface areas (see opposed side surfaces of element 22 shown in Fig. 8 projecting into a mass of food 19) and are readable directly on the claimed “at least two input heat transfer elements”. Similarly, the output heat transfer element (heat conducting fin 21) has first and second surface areas that are generally parallel to each other and the surface areas of grills 22 (see Figs. 5-8). Again, appellant’s conclusory statement that “Neither Reed nor Snyder disclose such a structure” is at odds with the clear disclosure of Reed.

For the above reasons, it is believed that the rejections should be sustained.

⁴ MPEP 2144.

Respectfully submitted,

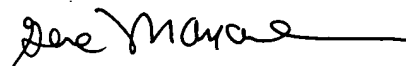
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